



January 22, 2002

Ms. Lydia L. Perry
Attorney for Coppell I.S.D.
Law Offices of Robert E. Luna
4411 North Central Expressway
Dallas, Texas 75205

OR2002-0311

Dear Ms. Perry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157565.

The Coppell Independent School District (the "district"), which you represent, received a request dated October 25, 2001 for "the performances [sic] objectives that were to 'be written sometime this fall.'" You claim that the requested information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted. We also received comments from the requestor and another interested party.¹

Initially, we must address the requestor's claim that the district was required to release the requested information in accordance with an earlier open records letter ruling. In Open Records Letter No. 2001-5718 (2001), this office addressed a request for performance objectives written or issued between January 1, 1995, and September 17, 2001. We concluded that this information was not excepted from public disclosure and must be released. The requestor claims that the information encompassed by the present request already existed when the previous request was made. He asserts that the district was therefore required to release this information in accordance with Open Records Letter No. 2001-5718 (2001). You inform this office, however, that the information in question did not exist when the district received the previous request. Whether this information was in existence when the district received the previous request presents a fact issue. This office cannot resolve factual disputes in the opinion process. See Open Records Decision Nos. 592

¹See Gov't Code § 552.304 (providing that any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). Thus, having considered the requestor's arguments and your representations, we find that the information at issue did not exist when the district received the previous request for information. Accordingly, Open Records Letter No. 2001-5718 (2001) is not applicable to the information in question. *See* Open Records Decision No. 452 at 3 (1986) (information is not within scope of Gov't Code ch. 552 if it does not exist when governmental body receives request for information).

The district claims that the requested information is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. The district asserts that the requested information is confidential under section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In that decision, we determined that the word "teacher," for purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. We also concluded that the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You assert that the requested performance objectives were set by the district's board of trustees as part of the school superintendent's evaluation process. You argue that the performance objectives therefore qualify as an evaluation of the superintendent for purposes of section 21.355 of the Education Code. However, having reviewed the information in question, we find that this information does not actually evaluate the superintendent's performance. *See* ORD 643 at 3 (unless document at issue evaluates, as that term is commonly understood, performance of teacher or administrator, it is not confidential under section 21.355). Therefore, the requested information is not confidential under section 21.355 of the Education Code and may not be withheld from disclosure under section 552.101 of the Government Code.

The district also raises section 552.122 of the Government Code. Section 552.122(b) excepts from disclosure "a test item developed by a . . . governmental body[.]" In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in

a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Having considered your arguments, we conclude that you have not shown that the requested performance objectives constitute test items; therefore, the district may not withhold this information under section 552.122.

In summary, the requested information is not excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code or under section 552.122. Therefore, the district must release this information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

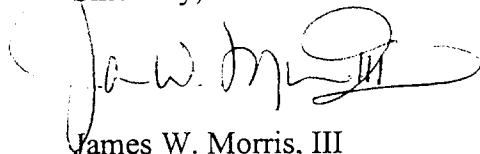
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in dark ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a stylized "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 157565

Enc: Submitted documents

c: Mr. R.G. Harrell
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